ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut	)	
Department of Public Utility	)	PR Docket No. 94-106
Control to Retain Regulatory	)	PR File No. 94-SP4
Control of the Rates of Wholesale	)	
Cellular Service Providers in the	)	
State of Connecticut	)	

REPLY COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC.

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To: The Commission

REPLY COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"),[1/] by its attorneys, hereby submits its Reply Comments in connection with the above-captioned petition ("DPUC Petition").

INTRODUCTION AND SUMMARY

In the Second Report and Order,[2/] the Commission established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers. The Commission found that imposing these

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1/ On September 19, 1994, McCaw became a wholly-owned subsidiary of AT&T Corp.

2/ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411 (1994) ("Second Report and Order").

requirements on cellular and other CMRS providers would not serve the public interest, and that forbearance from unnecessary regulation of CMRS providers would enhance competition in the mobile services market.[3/] Finally, the Commission ensured that like mobile radio services would be subject to consistent regulatory treatment.

In its initial comments on the various state petitions to extend the rate regulation of CMRS, McCaw argued that the basic framework established by Section 332(c) and the Second Report and Order required three separate showings in support of continued regulation. First, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support the Commission's decision to forbear from rate and tariff regulation. Second, because the Commission expressly relied upon the continuing availability of federal remedies under the Communications Act, a petitioning state must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these remedies. Third, in the unlikely event that a state can make the showings described above, it must also show that any marginal benefits of the proposed state regulation outweigh the substantial costs associated with regulation.

Two parties with a vested interest in maintaining disparate and burdensome regulation of cellular carriers, the National

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3/ Id. at 1467.

Cellular Resellers Association ("NCRA") and Nextel Communications, Inc. ("Nextel") have filed generic comments in support of the Connecticut Department of Public Utility Control ("DPUC") petition and other state petitions[4/] to retain or impose regulation of CMRS providers. Their comments read as if the Second Report and Order were never adopted. On the basis of general and unsubstantiated assertions concerning the state of competition in cellular markets, both parties would have the Commission sanction the regulatory disparities that the amendment of Section 332(c) was intended to redress. Neither NCRA nor Nextel presents a scintilla of evidence that might be considered by the Commission in determining whether any of the states have met their statutory and regulatory burden of proof to justify continued rate regulation of CMRS. As such, these comments are simply irrelevant to the detailed showings required in this proceeding.

Nextel also attempts to resurrect arguments that it has previously made, which attempt to justify regulation of cellular carriers based on their supposed "dominant" status. Both Congress and the Commission have rejected differences in regulatory treatment based on dominant/non-dominant distinctions. Rather, Section 332 sets forth a clear standard that must be met by a state seeking to regulate CMRS providers in general or cellular carriers in particular, and this standard is not met simply by trumpeting

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[4/] State petitions also were filed by Hawaii, PR Docket No. 94-103; Arizona, PR Docket No. 94-104; California, PR Docket No. 94-105; Louisiana, PR Docket No. 94-107; New York, PR Docket No. 94-108; Ohio, PR Docket No. 94-109; and Wyoming, PR Docket No. 94-110.

the fact that the Commission has never explicitly found cellular licensees to be non-dominant carriers.

A number of commenters supporting the DPUC Petition rely on the findings and conclusions in the DPUC's decision to seek rate regulatory authority. The DPUC's decision, however, provides no basis for a determination that prevailing market conditions are inadequate to protect CMRS subscribers. Its unsupported and unconfirmed allegations that wholesale carriers engage in coercive and anticompetitive tactics in dealing with independent resellers do not support its request for rate regulation authority.

I. NEITHER NCRA NOR NEXTEL HAVE PROVIDED ANY EVIDENCE IN SUPPORT OF ANY OF THE STATE PETITIONS

The comments of NCRA and Nextel argue in the most general terms that competitive conditions in cellular markets are such that the states should be permitted to regulate cellular rates. The time for general arguments is over. The Second Report and Order sets forth a clear analysis of general competitive conditions in cellular markets, and, as McCaw pointed out in its various initial comments in response to the state petitions, the Commission concluded that these conditions do not warrant tariff, rate or entry regulation.[5/] In order to overcome this fundamental conclusion, the states and their supporters must provide specific proof of market conditions different from the general competitive

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[5/] See Opposition of McCaw Cellular Communications, Inc. to the Petition of the Connecticut Department of Public Utility Control, PR Docket No. 94-106, PR File No. 94-SP4 at 5-6 (filed September 19, 1994) ("Opposition").

conditions described by the Commission, as well as proof that federal remedies are inadequate, and that the benefits of any proposed state regulation outweigh the costs.[6/] Neither Nextel nor NCRA has provided one shred of evidence on any of these issues.

Predictably, Nextel throws the main weight of its arguments against state regulation of the services which Nextel provides. Because McCaw believes no case has been made that any CMRS provider should be subjected to state regulation, McCaw does not disagree with Nextel's self-interested concern. Nextel goes wrong, however, in its attempt to suggest that regulation of cellular carriers by the states is justifiable. In support of this proposition, Nextel merely proffers a series of general statements that cellular carriers exercise market power, and briefly alludes to the "documented lack of competition and evidence of dominant providers in some states."[7/] It offers no economic or other evidence whatsoever. This is not proof of market conditions requiring state regulation.

In support of its arguments, NCRA cites eight different "federal documents" which allegedly contain conclusions that cellular markets are not competitive. One of these documents, oddly, is the Commission's Second Report and Order, where the Commission found that "there is no record evidence that indicates a need for full scale regulation of cellular or any other CMRS

[6/] See, id. at 12-16.

[7/] Nextel at 13.

offerings."[8/] Moreover, as McCaw has noted in its initial comments, the Commission expressly concluded that forbearance from regulation of cellular carriers is appropriate, notwithstanding its concerns over the level of competition in cellular markets.

Of the seven other federal reports, many "analyze" cellular competitiveness only to the extent that they assume certain outcomes are likely based on the apparent dual-competitor -- or duopoly -- structure of the cellular industry.[9/] The reports generally predate the passage of spectrum auction legislation and do not seriously consider the competitive impact of CMRS or PCS. More importantly, perhaps, all but one of them predates the Second Report and Order. McCaw submits that the Commission's analysis in the Second Report and Order is dispositive, particularly in light of the Commission's extensive analysis of the economic evidence in the record before it.

In any case, these "federal documents" are of no value in considering whether any particular state has met its burden of proof in justifying current or prospective regulation of cellular markets. NCRA cites no state-specific findings in any of these

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[8/] Second Report and Order at 1478.

[9/] McCaw also has submitted detailed economic critiques of the conclusions contained in two of the analyses cited by NCRA. See Opposition of McCaw Cellular Communications, Inc. to the Petition of the People of the State of California and the Public Utilities Commission of the State of California, PR Docket No. 94-105, at 12-13 (filed Sept. 19, 1994), Exhibit A, Declaration of Bruce M. Owen on the California Petition, at 31 (critiquing conclusions in National Telecommunications and Information Administration, U.S. Spectre Management Policy: An Agenda for the Future (1991)); id. at 39 (critiquing Congressional Budget Office, Auctioning Radio Spectrum Licenses (March 1992)).

studies. Nor do any of these studies address the adequacy of federal remedies retained by the Commission, or the costs and benefits of particular regulatory responses. In short, these studies simply do not address the ultimate question before the Commission: the appropriateness of specific state regulations.

II. THE COMMISSION SHOULD REJECT NEXTEL'S SUGGESTION THAT STATE REGULATION OF "DOMINANT" CARRIERS IS JUSTIFIED

Perhaps recognizing the weakness of its economic showing, Nextel also suggests that state regulation of cellular can be justified on the basis of cellular's "dominant" status.[10/] Having rejected this argument in determining to forbear from federal regulation of CMRS, the Commission should likewise dismiss it in this context.

As Nextel is surely aware, neither Congress nor the FCC found the dominant/non-dominant distinction to be relevant in regulating CMRS. Section 332(c) does not require the Commission first to classify a commercial mobile service provider as "non-dominant" to justify forbearance. Congress was well aware of the dominant/non-

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[10/] Nextel at 11-14. Similarly, Mobile Telecommunication Technologies Corp. ("Mtel") and E.F. Johnson Company ("E.F. Johnson") request that paging, local SMRS, and narrowband PCS providers be exempted from any rate regulation imposed by the DPUC. Like Nextel, these commenters seek dissimilar regulation of commercial mobile service providers on the basis of market power distinctions that the Commission has already rejected. See Mtel Comments at 6-8; E.F. Johnson Comments at 5. The Commission should dismiss these attempts to reestablish the regulatory disparities that Congress sought to correct.

dominant distinction when it enacted Section 332(c).[11] Nonetheless, when House-Senate conferees added the requirement that the Commission evaluate market conditions before it decided to forbear,[12] they did not limit forbearance to carriers that had been declared "non-dominant." Rather, they required only that the Commission determine that forbearance will "promote competition among providers of commercial mobile services."[13] In the Second Report and Order, the Commission determined that cellular providers "face sufficient competition" to justify the relaxation of certain rules traditionally applied in non-competitive markets.[14]

The Commission's refusal to apply different regulation to cellular carriers is sound, and should apply equally to the pending state petitions. Distinctions between "dominant" and "non-dominant" providers are rooted in the wired marketplace, where entrenched monopolies control a dominant share of all potential customers in the market. Such distinctions are not applicable to the wireless industry, where nascent providers have single digit

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[11] See, e.g., H.R. Rep. No. 111, 103d Cong., 1st Sess. 260-61 ("House Report") (stating that the Committee was "aware" of the court decision voiding the "Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers").

[12] See 47 U.S.C. § 332(c)(1)(C).

[13] 47 U.S.C. § 332(c)(1)(C); see also H.R. Rep. No. 213, 103d Cong., 1st Sess. 491 ("Conference Report").

[14] Second Report and Order at 1470 (citing Cellular CPE Bundling Order, 7 FCC Rcd at 4028-29). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fifth Report and Order), 98 FCC 2d 1191, 1204, n.41 (1984) (emphasizing that cellular carriers' "ability to engage in anticompetitive conduct or cost-shifting appears limited").

shares of potential customers. Landline local exchange carriers, for example, still command virtually 100 percent of exchange service in their regions with penetration levels of approximately 94 percent, and are rightly tagged with the "dominant" label. In contrast, McCaw, the country's largest cellular carrier, has never served more than five percent of the potential subscribers on average in any of its cellular markets.

In a further attempt to preserve existing regulatory advantages, Nextel also suggests that states should be permitted to impose additional regulations upon "established" mobile service providers.[15/] Such a distinction would serve no useful purpose because no CMRS provider, "established" or otherwise, possesses market power or controls bottleneck facilities. Given the emerging nationwide competition among providers of wireless services, including Nextel, there is no need to handicap the market in favor of "new" entrants. In this regard, it is worth noting that Congress specifically considered and rejected a proposal to authorize the imposition of disparate regulatory requirements on existing providers and "new [market] entrants."[16/] Likewise, in the Second Report and Order, the Commission itself considered and rejected the suggestion of Nextel and others to impose differential regulation based on a carrier's alleged market power.[17/]

[15/] See Nextel Comments at 12-13, 14-15.

[16/] See Conference Report at 490-91.

[17/] Second Report and Order at 1473-1474.

In light of the clear rejection of Nextel's proposed distinctions at the federal level, the Commission must also reject such distinctions in evaluating state regulation. The Commission has determined that dissimilar regulation of mobile service providers is inconsistent with the growth and nationwide development of a competitive market for commercial mobile services.[18/] The states should not be permitted to establish such dissimilar regulation under color of Section 332(c)(3). Such a result would effectively substitute a patchwork of state-imposed regulatory classifications of CMRS providers for the uniform federal CMRS regulatory framework adopted by Congress, thereby undermining fair competition and the growth and development of commercial mobile services.

III. THE DPUC'S POLICY ESTABLISHED TO PROTECT THE VIABILITY OF CELLULAR RETAIL RESELLERS IS INADEQUATE TO JUSTIFY THE GRANT OF THE DPUC'S REGULATORY REGIME

As McCaw demonstrated in its opposition, the DPUC has failed to make the showing required by statute to justify state regulation of CMRS.[19/] Commenters supporting the DPUC Petition[20/] provide no data to demonstrate that market conditions in Connecticut are

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[18/] Id. at 1420.

[19/] McCaw Opposition to 19-25. See also Second Report and Order at 1504.

[20/] See Comments of Connecticut Telephone and Connecticut MobileCom, Inc. and Communications Systems, Inc.; Comments of the Connecticut Office of Consumer Counsel; Comments of the Attorney General of the State of Connecticut.

inadequate to protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Rather, they rely on the findings and conclusions contained in the DPUC decision to seek rate regulatory authority.[21] Their reliance is misplaced.

The DPUC's Decision deals not with whether prevailing market conditions are inadequate to protect CMRS subscribers, but rather the health and protection of the resale industry.[22] The DPUC's unsupported and unconfirmed allegations that wholesale carriers engage in coercive and anticompetitive tactics in dealing with independent resellers do not support its request for rate regulation authority.[23] Indeed, the Decision on its face acknowledges that it neither addresses nor resolves the key issues at stake in the instant proceeding.[24] It provides no basis for granting the DPUC's petition.

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[21] See DPUC Investigation into the Connecticut Cellular Service Market and the Status of Competition, Decision, Docket No. 94-03-27 (Aug. 4, 1994) ("Decision"), attached as Appendix A to the DPUC Petition.

[22] McCaw Opposition at 17-19.

[23] See McCaw Opposition at 5-15.

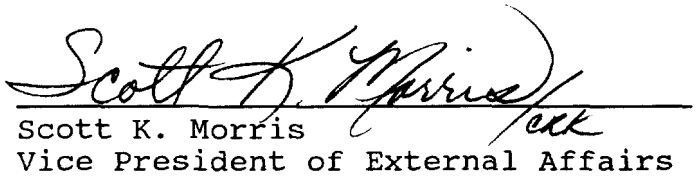
[24] Decision at 15 (noting DPUC's intent to "review the cellular carriers' cost and rate relationship to determine if existing rates and charges are just and reasonable to protect subscribers") (emphasis supplied); see also id. at 30 ("The record of this proceeding is inconclusive relative to the cellular carriers' rate of return and their financial performance since 1987.").

CONCLUSION

None of the commenters supporting the DPUC's petition provides any additional evidence upon which the Commission could find that the standard set forth in Section 332 has been met. For the reasons set forth above and in McCaw's initial comments, the above-captioned petition should be denied.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.



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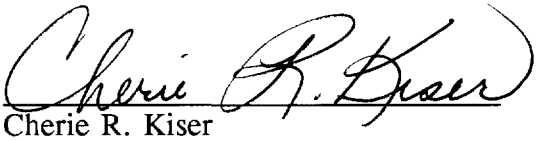
CERTIFICATE OF SERVICE

I, Cherie R. Kiser, do hereby certify that a copy of the foregoing Reply of McCaw Cellular Communications Corporation was served on the following by hand or first class mail, postage prepaid this 19th day of October 1994:



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